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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COUNTY OF ORANGE, Plaintiff and Respondent, v. PETER De MOORE, Defendant and Appellant.	G027432 (Super. Ct. No. 96P-012007) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Salvador Sarmiento, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Smith & Smith, E. Gary Smith and Keith N. Lamarra for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Mary Roth and Mary Tilton, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

THE COURT:[*]

[*] Before Rylaarsdam, Acting P. J., O'Leary, J., and Moore, J.

The superior court denied an order to show cause for modification of a child support order believing, incorrectly as we point out below, that it had no discretion to modify the award downward. We reverse and remand to permit the court to exercise its discretion.

I

Peter De Moore is the father of twin boys born in 1992. The mother and the minors began receiving public assistance in 1993. In 1996, the County of Orange filed a complaint against De Moore to establish paternity and child support. He admitted he was the father, but contended he had paid all child support due and owing (pursuant to a comprehensive support, custody, and visitation agreement he had with the mother) to the tune of $48,100.

On March 9, 1999, the court ordered De Moore to pay $2,407 in monthly child support. This amount was calculated on his then-current employment that paid him $100,000 per year. Two months later, De Moore filed an order to show cause for modification of the support order. The request was based on the fact he was fired from his job on March 29, 1999.

In his declaration to the show cause order, De Moore indicated that Printing Research, Inc., his prior employer, was owned by his father, his father had offered him the job in 1998, and it "was essentially a once in a lifetime opportunity . . . to earn an income substantially more than I had been earning," as evidenced by his 1997 income tax return which showed a yearly income of $14,600. Prior to his father's offer of employment, De Moore "operated a racing business which distributed professional race tires." He was hired as an "executive," and stated he was asked to resign because "I was not able to perform up to my father's expectations."

At the show cause hearing, the County told the court "we have agreed to modify current support . . . to $1,126 a month commencing July 1st, 1999." The County asked the court to retain jurisdiction to modify the order retroactively because "[De

Moore] is claiming that he lived in Texas, he worked for his father, then he was fired and he's moving now to Georgia and he's going to start his new company, but—and that's—and that's what his story is today. [¶] . . . And as an offer of proof, we're basing his child support based on the offer of proof and I just want to make sure that that's actually what happens." The agreement was made the order of the court. In its written order, the court made the specific finding "that there is sufficient change of circumstances to modify the current child support order."

At the March 3, 2000 review hearing, the court allowed each party to give an offer of proof. The County explained that "[t]he last time we were here in court the child support was reduced drastically actually, based on the fact that the defendant was no longer working, and was about to relocate. . . . [¶] [and] since then we have not gotten any indication that the defendant has actually started his business or how he's done in it. . . . [¶] Your Honor, we request that the defendant—that the child support order be reinstated to the original amount given the fact that the defendant had the ability to earn that much, and no longer does—no longer earns it and has made little attempt to go back to earning that same amount of money."

In response, De Moore explained that "[t]he previous order of $2400 was based upon the respondent being employed with his father for one year, at which he did have a high salary. He had absolutely no credentials for the job and as a result he fired him. Historically speaking, he has his own business making very little $15,000 to $20,000 per year. [¶] In June, when we were here, he had filed the order to show cause due to the fact that he was terminated from employment. [¶] . . . However, he has started his business, I think, in mid-December; and as a result he's earning approximately $4,000 per month from that business for about two and a half to three months now. And we would request that the order be based upon his income currently." When asked about why he was fired from his father's company, counsel stated that "he was not happy with his performance at all. In fact, I think, they had a breakdown of the relationship between

the two of them. [¶] And prior to him being employed with his father, he had never earned that much money, historically ever. [¶] And I would argue he has no ability to earn that at this point either."

De Moore was also asked why he was terminated. He explained: "Like I said, he never gave me a specific reason not—I don't know if he ever told me something to that effect, nothing was ever clarified enough with our relationship. If I should ask him, I may not even get a real reason and so—it was one of those big mysteries." He also submitted a declaration that spoke of his new business. In it, he stated that he "began operating my current business known as Rice Tire Café in Atlanta, Georgia on or about December 15, 1999. [¶] Declarant has been earning approximately $4,000.00 per month from my business for the past three months."[1]

II

At the end of the hearing, the trial court stated it was following this court's holding in *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212. *Padilla*, the court emphasized, required it to deny the order to show cause and reinstate the prior support order. Although recognizing that "his father fired him for reasons probably only known to him," the court explained its ruling this way: "If you are terminated from your job, it is because of something you did—and you can do that—you can act in a way that you want—to be terminated—but the law says your child support remains the same." The court conceded "if there's a layoff, if your company closes down and you didn't do anything to cause the layoff, then, that is good cause to modify child support. [¶] But when you do something that creates your termination of employment, *the law does not allow me to modify your child support* even if your income goes down to zero. The law says I must keep you at the same amount." (Italics added.)

[1] The record, including De Moore's declaration, indicates his new business was known as *Rice* Tire Café. We believe that is likely a misspelling, and that the correct name is *Race* Tire Café.

Contrary to the court's statement, *Padilla* did not set up any bright-line rule. It merely drew the unremarkable conclusion that in considering a parent's ability to earn (i.e., the earning capacity doctrine), a court may impute income even if the parent quit the higher paying job in good faith. (See *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1392.) In short, it did away with the notion that a court could impute income only if the parent had left his or her job in bad faith.

Whether De Moore should be imputed with the substantially higher income from his brief tenure with his father's company rests within the sound discretion of the trial court. (See Fam. Code, § 4058, subd. (b) ["The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children"].) However, the court's comments indicate that it did not exercise its discretion. Indeed, it appears it believed the law did not allow it to modify the support award here. Given the court did not exercise its discretion, the order is reversed, and the matter remanded to the superior court with directions to exercise its discretion. Appellant shall recover his costs on appeal.